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In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS BRUNO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA, PETITIONER,

v.

LOUIS BRUNO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE THIRD CIRCUIT

The United States of America, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled case entered on February 15, 1946, reversing a conviction of respondent for violation of the Emergency Price Control Act.

OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1946. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

1. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded.

2. Whether, if so, a custom of sellers to invoice goods at grades higher than those of the goods actually shipped constitutes a defense when the custom itself is in violation of the Price Control Act.[1]

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C. App. § 901, et seq.), as amended, and Maximum Price Regulation No. 30 (7 F. R. 9732) issued under Section 2 (a) of that Act. The pertinent provisions are set forth in the Appendix, *infra*, pp. 14–16.

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[1] In case certiorari is granted, we shall also argue that the court below erred in finding evidence of an industry custom to ship ungraded goods, in finding that respondent had repaid the amounts overcharged on all the shipments covered by the indictment, and in finding that there was insufficient evidence to support the jury's verdict.

STATEMENT

This is a criminal prosecution of Louis Bruno for selling waste paper at prices higher than those established by Maximum Price Regulation 30. Five separate sales were made the basis for as many counts in the information. The jury found the defendant guilty on all counts (R. 1a). Defendant was sentenced to six months' imprisonment and a fine of $500 (R. 1a).

Defendant dealt with a broker named Carrano. Carrano, though called a broker, was really an independent dealer who actually bought the paper from the defendant and paid for it. He sold it to his customers and had it shipped directly to them by the defendant. In each transaction Carrano ordered #1 Assorted Kraft Paper from the defendant. The defendant invoiced the shipments accordingly and charged $1.75 per hundred weight, the ceiling price therefor. Two carloads were sent to the Ohio Boxboard Company and three to the Taggart Corporation, as directed by Carrano. He paid the defendant the invoice price. (R. 9a–13a). However, actual inspection by the mills revealed that each shipment was composed almost entirely of corrugated paper (R. 28a–29a, 42a–43a), the ceiling price of which is $1.15 per hundred weight. The Secretary of the Ohio Boxboard Company testified that the inspection report on the first car showed that 27,984 pounds out of 34,719 pounds shipped were inferior paper (R. 28a).

On the second car 24,040 out of 24,525 pounds were upgraded, and only 485 pounds were Assorted Kraft, the correct grade. None was a superior grade (R. 29a, 30a).[3] The third shipment was composed entirely of inferior paper, as were the fourth and fifth (R. 35a–36a, 41a, 42a–43a).

In two cases the mills made no complaint about the upgrading (R. 43a) and defendant retained the overcharges (R. 12a, 43a). In three cases, after the Office of Price Administration had begun investigation, the mills paid Carrano only for the quality received; as a result debits were charged by Carrano to Bruno. In the first sale the debit was $187.44, leaving a correct price, according to the debit memo, of $448.15 (R. 109a); in the second the debit was $159.10, the correct price $302.06 (R. 110a); and in the third the debit was $270.69, the correct price $541.38 (R. 13a, 111a). Roughly, then, there was an overcharge of from 40% to 50% on these three shipments where debits were made. On the two shipments where defendant kept the full invoice price, the overcharge was approximately 50%.

[3] The court below, in footnote 4 of its opinion, erroneously stated that an undercharge was made for this small item. This was based on the debit memo from Carrano to Bruno (R. 110a) and Bruno's statement (R. 68a). But the mill which actually inspected the paper found that it was only Assorted Kraft paper as invoiced, and paid for it at $1.75 per hundred weight (R. 29a, 30a).

Bruno admitted that he frequently shipped inferior paper, and billed it as Assorted Kraft Paper (R. 67a–71a).[2] There was testimony that the mills customarily inspected their receipts of wastepaper, and if they were below grade, would notify Carrano (R. 17a, 18a). He would communicate with the defendant, and if the latter agreed, Carrano would allow the mill to keep the merchandise and pay the correct price. *Ibid.* Carrano in turn would debit the defendant for the difference between the correct price and that already paid (R. 68a, 70a).

Carrano testified that he had no arrangement with Bruno whereby Bruno could bill merchandise as Assorted Kraft but ship inferior paper (R. 88a). The accountant for the Taggart Corporation testified that he had received no previous reports that corrugated paper was shipped instead of Assorted Kraft (R. 42a), despite defendant's admission that he often did this (R. 67a–71a). The government proved that the three repayments of the overcharge to Carrano promptly followed an OPA investigation, and offered to prove that these were the only ones ever made during the long course of dealings between Carrano and Bruno (R. 24a, 42a). Defendant admitted that he knew Carrano wanted

[2] Defendant admitted that he did not do this because the paper was mixed in his warehouse, inasmuch as the different types were baled separately, but merely because he just threw in inferior paper when he didn't have enough Assorted Kraft for an order (R. 68a–70a).

Assorted Kraft when he made such orders (R. 77a), and that on at least two occasions when he shipped different grades of paper he listed them separately (R. 82a).

Bruno billed Carrano for Assorted Kraft Paper, but in his ledger, he entered much lower figures. The first sale was invoiced at $635.59 but entered as $476.69, and similar entries were made for the other sales (R. 53a). The lower figures were far closer than the invoice prices to the correct ceiling prices.[4] No record of any debit whatsoever for upgraded material was made in the books kept by the firm (R. 54a).

The Circuit Court of Appeals overturned the jury's verdict and held that no criminal violation had been established, on the theory that an upgraded sale does not violate a price regulation when there is an industry practice whereby the buyer reserves the right to regrade the shipment on arrival, and where it may be customary for the seller to ship and bill without regard for the lower quality of the merchandise.

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[4] Defendant explained these large discrepancies by declaring that he had an arrangement with his brother (whose wife owned the firm) which allowed him these differences as his commission (R. 72a, 73a). On these five sales, if these concealed amounts were commissions, they would amount to roughly $10 per ton. Defendant stated that the firm sold from 300 to 500 tons of paper weekly (R. 60a). This would mean that while his salary was $20 per week (R. 60a), his commissions would range from $3,000 to $5,000 weekly, or about one fourth of the gross sales made!

REASONS FOR GRANTING THE WRIT

1. The decision of the court below, if allowed to stand, makes it virtually impossible for the government to protect price ceilings from a favorite device of the black market—upgrading. Upgrading consists of invoicing merchandise at grades superior to those shipped, thereby concealing an overceiling charge for the inferior merchandise actually delivered.

This is a typical case of flagrant upgrading. The jury found that the seller had shipped waste paper under a false description in order to obtain, and had been paid, more than the ceiling price. The court below held that the seller had a defense because of the following practices: the mills (which bought from the broker) inspected the shipments, and when they detected and complained about an upgraded shipment, the broker notified the defendant; if he consented, the mill kept the shipment and the broker debited the defendant for the difference between the price already paid on the inflated invoice and the ceiling price;[5] it was customary for the shipper to fill up a car with anything he had.

The importance of the court's ruling springs from the pervasiveness of the defense it recognizes and its effect on the administration and enforcement of the Emergency Price Control Act.

[5] The debiting did not, contrary to the assumption of the court below, always take place. See p. 4, *supra*.

a. The primary emphasis of the opinion below is on the mills' inspection of the merchandise. This asserted defense is always present when a seller attempts to evade price regulations by upgrading. The "business custom" attributed by the court to purchasers of waste paper is nothing more than the universal practice of buyers to inspect what they order and to refuse to pay for something they do not receive. The housewife opening a department store delivery of her order follows this custom along with thousands of industrial and commercial concerns. What the mills did in this case was simply to exercise their elementary rights under the law of sales. Accordingly, the court's ruling implies that willful upgrading in any of the millions of sales subject to price control is not a violation of the Price Control Act.

Since the beginning of price control, the Office of Price Administration has found upgrading practiced in the sales of numerous scarce commodities. In order to detect and halt this method of evading price ceilings, it has found it necessary to conduct continuing programs of inspecting merchandise after shipment, usually at destination, and comparing the inspection reports with the invoices. It has made thousands of such inspections and has found thousands of upgrading violations, particularly in meat, butter, eggs, corn, coffee, lumber, waste paper, hides, and iron and steel scrap. Numerous civil and criminal cases

have been instituted and brought to successful conclusion on the basis of these inspections and many are still pending. In many of these cases the defendant has urged that the recipient of the merchandise had the practice of inspecting the goods received and either rejecting misdescribed goods or paying only on the basis of the true description. Unless reversed, this decision will greatly impede these enforcement programs.

The decision, in this aspect, conflicts with *United States ex rel. Bowles* v. *Leonard Seidmon*, decided by the Circuit Court of Appeals for the Seventh Circuit on March 19, 1946 (not yet reported). This was a proceeding against a seller of iron and steel scrap for criminal contempt of an injunction. The evidence showed that upon inspection at the time of unloading the buyer was entitled, under the contract of sale, to reject any undergrade material found or to retain and pay for it at the price provided for the grade. The court affirmed the judgment of criminal contempt for violating a provision of an injunction which enjoined the defendant from "directly or indirectly selling, delivering, or offering for sale or delivery, iron and steel scrap at prices in excess of the maximum prices therefor * * *" Even if the *Seidman* case, in which no overceiling payment was received by the seller, holds no more than that, under such circumstances, there was a wilful offer to sell in violation of the regula-

tion, it conflicts with the theory of the court below which necessarily involves the conclusion that where a seller knows that his purchaser may inspect and downgrade in accordance with contract or custom no wilful violation is possible.

b. The opinion of the court below states:

> It was also in the testimony that in times like the present, with paper very scarce, the shipper would customarily fill up the car with whatever he had on the assumption, as proved by experience, that the factories were very glad to have any kind of paper they could get.

There is nothing in the record which supports this statement, with the problematical exception of the defendant's testimony that he upgraded his cars. There is, of course, nothing wrong in filling a car with whatever one has, so long as the purchaser is not charged for higher grade merchandise than is sent. In the absence of any showing that it was industry practice to ship various grades of paper and invoice for the highest grade, defendant's testimony that he frequently did this proves only that he violated the law.

And even the existence of such an industry custom of loading low grade paper and invoicing for a higher grade would have been irrelevant, inasmuch as such a practice would have been in violation of the provisions in the Act and regu-

lations requiring correct invoicing,* and sales and deliveries at not higher than ceiling prices. Certainly defendant could gain no comfort from a custom which in itself was unlawful. If that were not so an industry in which black-marketing were sufficiently prevalent would by reason of that fact alone be immune from prosecution. It is important that no such means of evasion of the Price Control Act as appears to be available under the decision below be left open to black-marketers.

Testimony that the mills had a practice of inspecting and rejecting upgraded merchandise is not, of course, equivalent to testimony that shippers customarily shipped upgraded cars. The only pertinent evidence in the record, Carrano's testimony, contradicts the existence of the latter practice (R. 88a). Furthermore, the broker customarily specified particular grades in his order (R. 15a), a meaningless gesture if he expected random loading; and Bruno knew that Carrano wanted what he specified (R. 77a).

2. It is, of course, the function of the jury and not of the appellate court to find the facts. In this case there was clearly no basis for the reversal by the court below of the jury's finding

* The provision of the regulation, *infra*, pp. 15–16 requires that sales of waste paper be invoiced and the invoices kept on file. Section 204 (b) and 205 (b) make it unlawful for anyone to make a false statement in any document required to be kept or filed.

that the defendant sold wastepaper with the intent to obtain overceiling prices.

The regulation prohibits the sale and delivery of wastepaper at prices in excess of ceiling prices. The evidence is uncontroverted that the defendant sold and delivered corrugated paper for the higher ceiling prices applicable to sales of Kraft, and received payment at such prices, knowing that he had not shipped Kraft. On these facts, the violation was complete under the terms of the regulation. The subsequent inspection and charge back, all by third persons, could not relieve the seller of the violation he himself had committed. Indeed, since the seller had delivered, billed, and received payment, there was no additional action within his control which he could have committed to violate the regulation further on that sale.

3. The court below also stated that the evidence was "clear and explicit * * * that the ultimate price paid was not more than ceiling." This was not true as to the sales described in two of the five counts of the indictment, as to which no debits or repayments were made. See pp. 4–5, *supra*. There can be no question, therefore, that these sales were unlawful even under the court's own theory. The penalty imposed on defendant was not in excess of that allowable for either of these two counts (R. 1a).

CONCLUSION

The court below decided questions of importance to the enforcement and administration of the Emergency Price Control Act. Its decision conflicts with a decision of another Circuit Court of Appeals. It is clearly wrong. For these reasons a writ of certiorari should be granted.

Respectfully submitted,

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Solicitor General.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
Office of Price Administration,
Washington, D. C.

MARCH 1946.

APPENDIX

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, as amended by the Stabilization Extension Act of 1944, 58 Stat. 632, 50 U. S. C. App., Supp. IV, 901, *et seq.*, are Sections 4 (a) and 205 (b).

Section 4 (a) provides:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 205 (b) provides:

> (b) Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprison-

ment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

The pertinent provisions of Maximum Price Regulation No. 30, which establishes maximum prices for wastepaper, are as follows:

§ 1347.1 PROHIBITIONS. Regardless of any contract, agreement, lease or other obligation:

(a) No person shall sell or deliver any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(b) No person shall buy or receive any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(c) No person shall agree, offer, solicit, or attempt to do any of the foregoing.

Section 1347.14 (f) as it existed at the time of the transactions involved:

(f) *Invoice requirements.* All sales of wastepaper commercially packed shall be invoiced. When delivery of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped

except that in those cases where seller does not receive the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items the following data:

(1) *The grade name.* This shall be (i) the applicable grade name set forth in paragraph (a) of this § 1347.14, or (ii) the grade name of a specialty with respect to which sworn statements and samples have been submitted to the Office of Price Administration in accordance with paragraph (c) of this § 1347.14.

(2) *The origin of the shipment.* This shall include the name of the city or town where the point of shipment is located. If delivery is in the seller's own truck, and if the point of shipment and the buyer's premises are located at a distance of more than ten but less than fifteen miles from each other by the shortest available highway route, the street address and city where such point of shipment is located shall be shown.

(3) *The destination of the shipment.* This shall include the name, street address and city of the consumer.

(4) Any amount charged by the seller for transportation of the wastepaper.

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